



The University of the State of New York

The State Education Department State Review Officer

No. 07-109

**Application of a CHILD WITH A DISABILITY, by his parent,
for review of a determination of a hearing officer relating to
the provision of educational services by the New York City
Department of Education**

Appearances:

Goldman & Maurer, LLP, attorney for petitioner, Brian Goldman, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner appeals from that part of the decision of an impartial hearing officer which denied his request for certain relief as a remedy for the failure of respondent's Committee on Special Education (CSE) to recommend appropriate programs for his son for the 2005-06 and 2006-07 school years. The appeal must be sustained in part.

Preliminarily, I will address the procedural issues raised in this appeal. Petitioner attaches to his appeal a neuropsychological evaluation report dated June 28, 2007. In its answer, respondent objects to petitioner's attempt to introduce the evaluation report. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). The evaluation report, which is dated June 28, 2007 and reflects testing conducted on June 19, 2007, was available at the time of the impartial hearing.¹ The evaluation report is not necessary for my review of this appeal and I decline to accept it.

¹ Although it is not clear from the record, petitioner alleges that the impartial hearing officer denied his request to enter the evaluation report into evidence (Am. Pet. ¶ 30). Respondent denies the allegation (Answer ¶ 30).

Petitioner submitted a reply to respondent's answer and respondent requests that I not accept it. State regulations limit the scope of a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; Application of the Bd. of Educ., Appeal No. 06-069; Application of the Bd. of Educ., Appeal No. 01-012). Petitioner's reply does not respond to the procedural defenses interposed by respondent, and therefore, I have not considered it (Application of a Child with a Disability, Appeal No. 06-069; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009).

The student was in a special class at one of respondent's elementary schools when the impartial hearing began in June 2007 (Tr. p. 21). His cognitive abilities are in the average range of functioning and his academic achievement test scores are primarily in the low average to average range (Dist. Ex. 2 at p. 4). The student's overall reading ability is limited and his basic reading skills, sight vocabulary, phonics, and structural analysis, are "negligible" (*id.* at p. 2). His spelling also is limited as is his fluency with which he performs academic tasks (*id.*). The student's classification and eligibility for special education services as a student having a learning disability are not in dispute (8 NYCRR 200.1[zz][6]).

In January 2005, petitioner requested that his son be evaluated (Parent Ex. I). On January 19, 2005, one of respondent's social workers interviewed the student's father in both Spanish and English to obtain a social history (Parent Ex. E at p. 1). On January 24, 2005, the student's teacher completed an "Academic Functioning" form indicating that the student often did not understand verbal directions until they were repeated (Parent Ex. G at p. 1). The teacher also indicated that the student read slowly, had difficulty decoding, was not sure of vowel sounds and did not always recognize sight words (*id.*). She further indicated that the student was not aware of the sounds that letters make and that his spelling often did not improve even after repeated usage (*id.*). The teacher reported that the student continued to reverse some letters (*id.* at p. 2). She noted that the student relied on a number grid for addition and subtraction and that he was not adapting to paper and pencil (*id.*). She also noted that the student was frequently inattentive and talkative (*id.*).

The CSE met on March 14, 2005 for the student's initial review (Parent Ex. C). The CSE determined that the student be classified as having a learning disability and recommended that he be placed in a special class with a staffing ratio of 12:1 (*id.* at p. 1). The CSE did not recommend any related services for the student (*id.* at p. 12). The individualized education program (IEP) developed as a result of the March 2005 CSE meeting did not provide for an initiation date (*id.* at p. 2), and the student continued to attend class in the regular education environment for the remainder of the 2004-05 school year (Tr. pp. 488-89).

Respondent conducted a psychoeducational evaluation of the student in March 2005² (Parent Ex. D at p. 1). Administration of the "Wechsler Intelligence Scale for Children" yielded

² It is unclear from the hearing record if the evaluation was conducted on March 19, 2005 or March 10, 2005 (Parent Ex. D at p. 1; *see* Dist. Ex. 3). Some of the standardized test scores from the evaluation are listed on the March 14, 2005 IEP (Dist. Ex. C at p. 3).

scores that placed the student in the average range of cognitive functioning (id.). The evaluator reported that significant scatter was present between the student's verbal and nonverbal functioning (id.). In the verbal area, the student reportedly demonstrated strengths in his responses to tasks requiring judgment and social interactions as well as in his ability to define words (id.). The student's fund of general knowledge acquired both in school and at home was determined to be age appropriate (id.). In the nonverbal area, the student's abilities varied and were mostly in the borderline range (id.). The evaluator reported that the student demonstrated difficulty with visual sequencing as well as with attending to detail and working with speed and accuracy on a task that required the use of a pencil and paper (id.). The evaluator further reported that the student exhibited relative strengths in his ability to reason nonverbally when the information was not abstract (id.). Administration of the Woodcock Johnson III Tests of Achievement (WJ III) yielded standard (and percentile) scores of 99 (47) in oral expression, 76 (6) in broad reading, 106 (63) in broad math, 65 (1) in basic reading skills, 116 (86) in math calculations skills, 87 (19) in academic skills, and 79 (9) in academic fluency (id. at p. 4). The evaluator reported that the student's overall reading ability was very limited and that his basic reading skills were "negligible" (id. at p. 2). Results of the evaluator's observations and projective testing indicated that the student was a cooperative and dedicated youngster who appeared to do his best to please others (id.). The evaluator opined that the student appeared frustrated with his weaknesses and was aware that he was having academic difficulties (id.).

In early March 2005, one of respondent's psychologists referred the student for a speech-language evaluation that was completed on March 30, 2005 (Parent Ex. F). The evaluator reported that the student's hearing skills appeared adequate for reception of speech and language and that his processing deficits appeared unrelated to acuity factors (id. at p. 1). Articulation and phonological development were determined to be within normal limits (id.). The Clinical Evaluation of Language Fundamentals 4 (CELF-4) was administered to the student in English and yielded standard (and percentile) scores of 61 (.5) in receptive language, 83 (13) in expressive language, and 73 (4) in core language (id. at p. 2). The evaluator reported that the student exhibited significant difficulty, having achieved a scaled score of 1, on a subtest of the CELF 4 that measured following verbal directions involving concepts of inclusion/exclusion, sequence, coordination, condition, location, and temporal relationships, and a scaled score of 5 on a subtest that measured processing and interpreting spoken sentences to correctly identify a described picture (id. at pp. 2-3). The student also exhibited difficulty applying word structure rules (morphology), using appropriate pronouns, repeating spoken sentences of increasing length, formulating complete semantically correct sentences, and identifying two related words from four presented auditorily (id. at p. 3). Administration of the Receptive One-Word Picture Vocabulary Test (ROWPVT) and the Expressive One-Word Picture Vocabulary Test (EOWPVT) yielded standard (and percentile) scores of 91 (27) and 70 (2), respectively (id. at pp. 3-4). The evaluator recommended that, due to the student's receptive and expressive language deficits, he receive speech-language therapy for 30-minute sessions three times per week (id. at p. 4).

The student continued to attend school in respondent's district for the 2005-06 school year where he was placed in a special class (Tr. p. 490). His program did not include speech-language services (Parent Exs. B; C). The CSE convened on March 16, 2006 for the student's annual review (Parent Ex. B). It continued to recommend that the student be placed in a special

class (id. at p. 1). It did not recommend any related services for the student (id. at p. 11). The IEP developed as a result of the March 2006 CSE meeting provided for an initiation date of March 16, 2006 with a duration of services for one year and a projected date of review of March 16, 2007 (id. at p. 2).

For the 2006-07 school year, the student continued to attend school in respondent's district in a special education class (Tr. p. 184). In November 2006, the student's teacher completed a survey of observable behavior traits (Parent Ex. H). She indicated that she observed the student demonstrate difficulties with organization, memory, concentration, reading, writing, spelling, mathematical calculations, attention and classroom behavior (id.). She also indicated that the student required repeated drill and practice to learn what other students mastered easily and that his performance on tests and quizzes were at a failing level (id. at p. 2).

The student was evaluated by a private evaluator in early 2007 to determine his academic strengths and weaknesses and his specific instructional needs (Parent Ex. K). The evaluator reported that based on results of standardized testing the student performed at a 1-1 grade level for reading skills and a kindergarten level for both spelling and written language (id.). She indicated that the student was in "critical need of specific multi-sensory instruction in decoding and encoding, particularly using the Orton-Gillingham approach" (id.). She further indicated that it was important that the student receive structured multisensory instruction to build written language and reading comprehension skills (id.). She recommended that the student receive individual tutoring using the Orton-Gillingham technique as well as specific instructional tools to build written language and reading comprehension skills (id.).

By due process complaint notice dated February 28, 2007, petitioner requested an impartial hearing (Parent Ex. J). Petitioner's due process complaint notice asserted that respondent failed to provide a free appropriate public education (FAPE)³ to their son for the 2005-06 and 2006-07 school years. Petitioner requested, among other things, a "Nickerson letter,"⁴ and "compensatory education" in the form of tutoring.

The CSE convened on March 20, 2007 for the student's annual review (Parent Ex. A). It continued to recommend that the student be placed in a special class (id. at p. 1). It did not

³ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

⁴ A Nickerson letter is a letter from the New York City Department of Education to a parent authorizing the parent to place the child in an appropriate special education program in any state-approved private school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a Nickerson letter is intended to address the situation in which a child has not been evaluated or placed in a timely manner (see Application of the Bd. of Educ., Appeal No. 06-088; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

recommend any related services (*id.* at p. 10). The IEP developed as a result of the March 2007 CSE meeting provided for an initiation date of March 16, 2007 with a duration of services for one year (*id.* at p. 2).

The impartial hearing began on June 14, 2007 and concluded on July 17, 2007, after four days of testimony. The impartial hearing officer rendered her decision on August 9, 2007. She found that the IEP developed as a result of the March 2005 CSE meeting was deficient and that the student was denied a FAPE for the 2005-06 school year. She also found that the IEP developed as a result of the March 2006 CSE meeting was deficient and that the student was denied a FAPE for the 2006-07 school year. Having determined that the student was denied a FAPE for the 2005-06 and 2006-07 school years, the impartial hearing officer considered and denied petitioner's request for a Nickerson letter finding that petitioner did not allege or prove that his son was not offered a timely placement. The impartial hearing officer also denied petitioner's request for compensatory education. However, she determined that the student was entitled to some equitable remedy to compensate for respondent's failure to provide adequate IEPs for two consecutive years and ordered respondent to provide the student speech-language therapy three times per week for 30 minutes until it obtained an updated speech-language evaluation and reconvened the CSE to determine whether the student continued to need such therapy. The impartial hearing officer also ordered respondent to provide the student with tutoring from an approved provider in reading, writing and spelling for up to two hours per week until such time as it obtained an updated psychoeducational evaluation and reconvened a properly constituted CSE for a determination as to whether the student required any other related services and whether the student was in need of additional help in reading, writing and spelling.

Petitioner appeals from the impartial hearing officer's decision. He contends that the impartial hearing officer erred in failing to direct the issuance of a Nickerson letter, failing to direct a sufficient number of "make-up hours" for speech-language services and failing to direct a sufficient number of hours of tutoring for reading, writing and spelling. Petitioner also contends that the impartial hearing officer erred in finding that he did not allege that the placement was not timely, in finding that he did not meet his burden for an award of compensatory education, in not admitting the June 2007 neuropsychological evaluation into evidence and in not ruling on the validity of the March 2007 IEP. Respondent does not appeal or cross-appeal from the impartial hearing officer's decision.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];⁵ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

⁵ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

As noted above, the impartial hearing officer found that respondent denied the student a FAPE for the 2005-06 and 2006-07 school years, but she determined that petitioner did not meet his burden for an award of compensatory education. Petitioner asserts that the impartial hearing officer erred in denying his request for compensatory education.

Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). I agree with the impartial hearing officer's determination that petitioner is not entitled to compensatory education, but for different reasons. Here, the deprivation of instruction can be remedied through the provision of "additional services" before the student becomes ineligible for instruction (Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 04-016; Application of the Bd. of Educ., Appeal No. 03-075; Application of a Child with a Disability, Appeal No. 01-094).

While compensatory education is a remedy that is available to students who are no longer eligible for instruction, additional services have been awarded to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047; see also Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). In general, the award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a FAPE (Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047).

The impartial hearing officer determined that the student was denied a FAPE for the 2005-06 and 2006-07 school years. To compensate the student for respondent's failure to provide adequate IEPs for two consecutive years, the impartial hearing officer ordered respondent to provide speech-language therapy three times per week for 30 minutes and tutoring in reading, writing and spelling for up to two hours per week. Petitioner asserts that the impartial hearing officer failed to direct a sufficient number of hours for speech-language services and tutoring. The hearing record includes a speech-language evaluation recommending that the student receive speech-language therapy for 30-minute sessions three times per week. It also includes information identifying the student's weaknesses in reading, writing, spelling, and a private evaluation recommending that the student receive an unspecified amount of individual

tutoring (Parent Exs. H; K). I concur with the impartial hearing officer that the evidence in hearing record does not support an award of the full amount of additional services requested by petitioner, however, I am concerned with the denial of a FAPE over a two year period. I will therefore modify and increase the impartial hearing officer's award of services, but not to the extent requested by petitioner. Unless the parties otherwise agree, the speech-language services and tutoring as ordered by the impartial hearing officer shall, at a minimum, continue until the end of the 2007-08 school year. In addition, I will order that the student be offered, at a minimum, a continuation of the same level of such services during July and August of 2008 and July and August 2009.

Petitioner also claims that the impartial hearing officer erred in finding that he did not allege that the placement was not timely and in failing to direct the issuance of a Nickerson letter. In petitioner's February 2007 due process complaint notice, he asserted that respondent failed to provide a FAPE to his son for the 2005-06 and 2006-07 school years and requested a Nickerson letter to be used for the 2006-07 school year (Parent Ex. J at p. 2). I note that the student was in special education placements during those school years (Tr. pp. 184, 490). The impartial hearing was not completed before the end of the 2006-07 school year and on the last day of the impartial hearing in July 2007, petitioner requested a Nickerson letter for the 2007-08 school year (Tr. p. 551). Despite acknowledging that a Nickerson letter is issued in situations where a student has not been evaluated or placed in a timely manner, petitioner asserted that because of respondent's serious and prolonged violations of state and federal substantive and procedural standards, a Nickerson letter should be issued (Tr. pp. 549-51). I agree with the impartial hearing officer and find that a Nickerson letter is not an appropriate remedy for respondent's failure to provide a FAPE to the student for the 2005-06 and 2006-07 school years.

In addition, petitioner claims that the impartial hearing officer erred in not ruling on the validity of the March 2007 IEP.⁶ He argues that the impartial hearing officer should have ruled on the validity of the March 2007 IEP because it establishes whether the CSE is providing a FAPE to the student for the 2007-08 school year. In his closing remarks at the impartial hearing, petitioner asserted that his son was denied a FAPE for the 2007-08 school year (Tr. pp. 538-40). At the hearing, the impartial hearing officer indicated that she did not have jurisdiction over the 2007-08 school year and that she did not have a request for an impartial hearing with regard to the March 2007 IEP (Tr. p. 539). She did not address the appropriateness of the March 2007 IEP in her decision.

I agree with the impartial hearing officer that she did not have jurisdiction over the 2007-08 school year. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]) or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). Here, petitioner's due process complaint notice

⁶ I note that the March 2007 IEP has a projected date of initiation of March 16, 2007 (Dist. Ex. 1 at p. 2), and therefore was in effect for part of the 2006-07 school year.

challenged the programs recommended for his son for the 2005-06 and 2006-07 school years (Parent Ex. J). Petitioner did not raise the appropriateness of the 2007-08 school year in his due process complaint notice, nor did he seek permission from the impartial hearing officer to amend his due process complaint notice to include the 2007-08 school year, nor does he assert that respondent agreed to raise the issue.

I have considered petitioner's remaining contentions and I find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's order of additional services, to be provided by a service provider approved by the NYC Department of Education, be modified as follows: unless the parties otherwise agree, the duration and frequency of the speech-language services and tutoring as ordered by the impartial hearing officer shall, at a minimum, continue until the end of the 2007-08 school year; and the student shall be offered, at a minimum, a continuation of the same level of such services during July and August of 2008 and July and August 2009.

Dated: **Albany, New York**
 December 7, 2007

PAUL F. KELLY
STATE REVIEW OFFICER